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In the Supreme Court of the United States

OCTOBER TERM, 1980

BRIAN A. CARLSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's assertion of his Fifth Amendment privilege against compelled self-incrimination with respect to his 1974 and 1975 federal income tax returns precluded his conviction for willfully failing to file income tax returns for those years.

2. Whether the lower courts correctly concluded that petitioner asserted the privilege against self-incrimination in bad faith and, hence, that his failure to file tax returns for the 1974 and 1975 tax years was willful.

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OPINIONS BELOW

The district court did not issue a written opinion.[1] The opinion of the court of appeals (Pet. App. "Opinion") is reported at 617 F. 2d 518.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1980,[2] and the court of appeals denied rehearing on May 8, 1980 (Pet. App. "Order"). The petition for a writ of certiorari was filed on August 6, 1980, and therefore was substantially out of time under both former Rule 22(2) and current Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a nonjury trial in the United States District Court for the Northern District of California, petitioner was convicted of willfully failing to file federal income tax returns for the years 1974 and 1975, in violation of 26 U.S.C. 7203. He was sentenced to two concurrent six-month terms of imprisonment and was fined $1,000. The court of appeals affirmed (Pet. App. "Opinion").

The evidence at trial established that petitioner was employed as a factory laborer in 1974 and 1975. He

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[1]Petitioner correctly states (Pet. 1) that "[n]o published opinion was rendered by the United States District Court for the Northern District of California," but he then adds that "[a] copy of said opinion appears in the appendix hereto." The unsigned opinion included in petitioner's appendix (Pet. App. "Memorandum of Opinion") is apparently a copy of an opinion filed by former United States District Judge Charles B. Renfrew in a case involving petitioner's brother.

[2]Petitioner incorrectly states (Pet. 2) that the judgment was entered on May 8, 1980.

earned wages totalling $9,346.21 and $13,053.33, respectively, during those years (Tr. 26).[3] Although he had filed complete tax returns for prior years, petitioner failed to do so for 1974 and 1975 (Tr. 17). Instead, he wrote across the front of his 1974 federal income tax form the words "*FILED UNDER PROTEST* I PLEAD THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION." In addition, he answered only those questions calling for his name, address and social security number. Petitioner signed and dated the form after crossing out phraseology stating that he was signing under penalty of perjury (Exh. 1.6).[4] Attached to the form was a one-page photocopied statement signed by petitioner. In that statement, petitioner invoked Sections 8 and 10 of Article I of the United States Constitution, as well as the First, Fourth, Fifth, Seventh, Tenth, and Fourteenth Amendments (Exh. 1.6). He also stated that he objected "to the form of the return upon the grounds that it may tend to supply information which may tend to lead to information which might tend to uncover information which might tend to incriminate me" (Exh. 1.6). He further stated that he did not earn $600 in "lawful constitutional money"; that there is little or no constitutional money available in circulation; that federal reserve notes are unconstitutional and cannot constitute taxable income; and that administrative rules promulgated by the Secretary of the Treasury are repugnant to the Constitution and void (Exh. 1.6).[5]

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[3]"Tr." refers to the transcript of the trial; "Exh." refers to the exhibits submitted in that proceeding.

[4]Petitioner testified (Tr. 62) that he had been "advised" to cross out the declaration regarding perjury.

[5]Petitioner conceded (Tr. 53) that he appended that information to his tax form as "part of the tax revolt thing."

On his 1975 form, petitioner supplied certain information regarding his address, social security number, occupation ("None"), filing status ("Single") and exemptions (one regular exemption for himself) (Exh. 1.8). On the face of the form, he printed the following: "I take the Fifth Amendment. This form violates my constitutional rights" (Exh. 1.8). After inserting "-0-" on the lines calling for the amounts of adjusted gross income, total taxes due, balance or amount of over-payment, and amount of refund to be sent to the taxpayer, petitioner crossed out the language declaring that the form was signed under penalty of perjury and signed and dated the form (Exh. 1.8). Nothing further was attached to this form (Exh. 1.8).[6]

Petitioner testified (Tr. 42-43) that he asserted his Fifth Amendment right against self-incrimination on both his 1974 and 1975 income tax forms because he had falsely claimed 99 withholding allowances on an Employee's Withholding Allowance Certificate (Form W-4) dated June 17, 1974 (Tr. 29), and he believed he would incriminate himself with regard to the false Form W-4 if he completed the 1974 and 1975 income tax forms. When asked why he had claimed 99 withholding allowances, he admitted (Tr. 43) that "[i] was part of a protest movement at that time." He also admitted (Tr. 45) that he submitted the Form W-4 to his employer with the knowledge that he was not entitled to 99 allowances, and that he knew that no income tax would be withheld from his wages due to the large number of claimed allowances. Petitioner further testified (Tr. 55) that he had been "advised" as "part of the general procedure" advocated in tax protest materials that he "should fill out a W-4 and claim too many withholding allowances, and then file a return claiming the Fifth Amendment" rather than submitting the information required by the return.

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[6]By his own admission at trial, this form was sent to the Internal Revenue Service by registered mail as part of petitioner's "tax revolt" plan (Tr. 61).

In rejecting petitioner's contention that he validly invoked the Fifth Amendment to avoid incriminating himself with respect to the false Form W-4, the district court found (Tr. 90) that "[h]e did not have a good-faith claim or reasonable ground for privilege, as he was a tax protester and his activities and his actions and methods of submitting his returns were those of a tax protester only." Consequently, the district court found petitioner guilty of failing to file federal income tax returns in 1974 and 1975 (Tr. 90-91).

In affirming the judgment of the district court, the court of appeals explained that petitioner's activities were nothing more than a "tax-evasion scheme" (Pet. App. "Opinion" at 2). The court determined (Pet. App. "Opinion" at 14) that petitioner's assertion of the privilege against self-incrimination was the "linchpin of [his] plan to evade the payment of taxes" and was contrary to the historical protective purpose of the privilege. It noted (*id.* at 8-9) that to permit petitioner to exercise the privilege in this manner "would emasculate the present system of revenue collection which, by virtue of its scope alone, necessarily depends upon personal reporting by wage earners."

ARGUMENT

1. Petitioner argues (Pet. 6-12) that the manner in which he invoked his Fifth Amendment privilege against self-incrimination on his 1974 and 1975 tax forms is consistent with this Court's suggestion in *United States* v. *Sullivan*, 274 U.S. 259, 263 (1927), that a taxpayer may assert the privilege on a tax form in lieu of providing information that may be incriminating.[7] Petitioner notes

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[7] This Court recently denied a petition for a writ of certiorari in *United States* v. *Reed*, 618 F. 2d 118 (9th Cir. 1980), cert. denied, No. 79-6527 (May 27, 1980), a case that involved substantially the same facts and issues presented here. There is no reason for a different result in this case.

(Pet. 7-8) that the court of appeals observed (Pet. App. "Opinion" at 7) that "there is little doubt that a truthfully completed tax return, stating his gross income, the lack of federal income taxes actually withheld, and the true number of available deductions would have provided 'a lead or clue to evidence having a tendency to incriminate' " him.[8] Petitioner argues (Pet. 12-20) that, given this observation, the court of appeals should have upheld his invocation of the Fifth Amendment.

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[8]We submit that any "lead" or "clue" supplied by properly executed 1974 and 1975 tax forms would have added almost nothing to the incriminating evidence that petitioner himself willingly supplied in his 1974 W-4 withholding form and his 1973 income tax form. The crime that petitioner purportedly sought to protect from discovery by invoking the Fifth Amendment in 1974 and 1975 was his false claim of an excessive number of withholding allowances on his Form W-4 in 1974. But the facts warranting investigation of that crime were apparent on the face of his 1973 income tax form and his Form W-4, and attention was drawn to this case by petitioner's own 1974 and 1975 "tax protest" returns.

Under Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.), Section 31.3402(m)-1(a)(1), an employee may claim withholding allowances with respect to "estimated itemized deductions and estimated wages." Section 31.3402(m)-1(b)(1)(i) of the regulations defines "estimated itemized deductions" as the "aggregate amount of deductions which * * * [an employee] *reasonably expects* will be allowable to him for the estimation year" (emphasis supplied). That amount may not exceed the sum of the amount of deductions shown on an employee's return for the previous year and the amount of his "determinable additional deductions" for the estimation year. See Section 31.3402(m)-1(b)(ii)(a) and (b). Section 31.3402(m)-1(b)(3)(a) defines "determinable additional deductions" as those itemized deductions which, in part, "are demonstrably attributable to identifiable events during the estimation year or the preceding taxable year, but only to the extent that they can *reasonably be expected to cause an increase in the amount of itemized deductions* on the employee's income tax return over the amount of corresponding deductions for the employee's taxable year preceding the estimation year" (emphasis supplied).

Under this regulatory scheme, petitioner's filing of a truthfully completed tax return in 1974 and 1975 would not, by itself, have

Even assuming, however, that petitioner effectively asserted the Fifth Amendment with respect to matters that he declined to disclose, it is clear that he did not comply with the statutory requirement that he file a tax return. On each form that petitioner filed, he crossed out the language declaring that the form was signed under penalty of perjury. Forms submitted to the Internal Revenue Service do not satisfy the statutory filing requirement when the declaration that the forms were completed and signed under penalty of perjury has been obliterated. See *United States* v. *Moore*, No. 79-2041 (7th Cir. Aug. 22, 1980), slip op. 6 (and authorities collected therein); *Cupp*. v. *Commissioner*, 65 T.C. 68, 78-79 (1976), aff'd mem., No. 76-2165 (3d Cir. June 10, 1977) (unpublished); see also *Commissioner* v. *Pilliod Lumber Co.*, 281 U.S. 245, 248 (1930).

In any event, we believe that the court of appeals correctly concluded that petitioner could not invoke the Fifth Amendment privilege in the circumstances of this case. Petitioner objects (Pet. 13-20) to the court of appeals' reliance (Pet. App. "Opinion" at 11) on the

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exposed him to a substantial additional threat of incrimination. A truthfully completed income tax form would not have demonstrated that the allowance claims were false at the time they were made (*i.e.*, when the Form W-4 was filed). Ascertainment of the falsity of the Form W-4 would require, *inter alia*, an examination of petitioner's 1973 income tax return and an identification of those anticipated events—if any—during 1974 that would have resulted in allowances in excess of those claimed in 1973. Petitioner's 1973 income tax return (Exh. 1.5) showed on its face that there was no apparent basis on which he could have anticipated sufficient deductions in 1974 so as to justify his claim of 99 allowances. Thus, petitioner's 1973 tax return and his Form W-4 themselves provided the information warranting an investigation of his grossly inflated withholding claims. Petitioner's 1974 and 1975 returns would not have had a significant bearing on the question whether the W-4 Form was truthful when it was made.

"history and purposes of the privilege" against self-incrimination in analyzing the propriety of his Fifth Amendment claim. The court first determined that the historical purpose of the privilege is "protective" and that petitioner's invocation of the privilege was at variance with that purpose. It then found (Pet. App. at 12-14) that petitioner "attempted to take advantage of the privilege's protective capacity to further a calculated effort to avoid the payment of taxes. * * * In other words, the Fifth Amendment was the linchpin of Carlson's plan to evade the payment of taxes. He used the privilege more as a sword than as a shield." The court concluded (*id.* at 15) that "[t]he history and purpose of the privilege do not, in light of such circumstances, weigh heavily in favor of extending its coverage to Carlson."

The court of appeals' reliance on the history and purpose of the privilege against self-incrimination, and its finding that petitioner was raising the privilege not in good faith but rather as a subterfuge to avoid payment of his taxes, is entirely consistent with this Court's repeated holding that "[i]t is the duty of a court to determine the legitimacy of a [party's] reliance upon the Fifth Amendment." *Roberts* v. *United States*, No. 78-1793 (Apr. 15, 1980), slip op. 8 n.7. An individual may not invoke the privilege if his real purpose is to avoid giving information that "he simply would prefer not to give." *Ibid.* See also *Mason* v. *United States*, 244 U.S. 362, 364-367 (1917); *Garner* v. *United States*, 424 U.S. 648, 658-659 n.11 (1976); *Rogers* v. *United States*, 340 U.S. 367, 371-375 (1951); *Brown* v. *Walker*, 161 U.S. 591, 599-600 (1896). See also *Clark* v. *United States*, 289 U.S. 1, 14 (1933). Petitioner's reliance on the privilege against self-incrimination was therefore invalid because, as the court of appeals determined, the Fifth Amendment was being

used not as a "shield" but rather as a "sword" to evade his current income tax obligations.[9]

Acceptance of petitioner's contrary contentions would mean that any tax protester could avoid filing income tax returns by adopting the simple expedient of claiming an inflated number of allowances or exemptions in a given tax year sufficient to avoid withholding from his wages, and thereafter refusing to file annual tax returns on the ground that the information therein might tend to reveal his earlier misconduct. As the court of appeals correctly noted, "the character and urgency of the public interest in raising revenue through self-reporting weighs heavily against affording the privilege [under such circumstances]. The federal government's power to raise revenue is its lifeblood. Were taxpayers permitted to employ Carlson's scheme, they could avoid filing completed tax returns and thereby severely impair the government's ability to determine tax liability" (Pet. App. "Opinion" at 15). Accord, *United States* v. *Brown*, 591 F. 2d 307, 308, 311 (5th Cir. 1979); *United States* v. *Johnson*, 577 F. 2d 1304, 1310-1311 (5th Cir. 1978).[10]

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[9]Moreover, petitioner did not invoke the privilege with respect to particular questions, but rather asserted a blanket privilege with respect to all financial information that was sought. The Fifth Amendment does not permit a taxpayer "to draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927).

[10]In rejecting petitioner's Fifth Amendment claims, the court of appeals also explained that "[a]nother factor in our weighing process is that the requirement of filing an annual income tax return is primarily designed to facilitate revenue collection, not criminal prosecution" (Pet. App. "Opinion" at 16). As this Court noted in *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965), "the questions in the income tax return [are] neutral on their face and directed at the public at large." Thus, like the accident reporting statute considered in *California* v. *Byers*, 402 U.S. 424, 430-431 (1971), the Internal Revenue Code is not intended as a device to promote criminal

2. Even though, as we have demonstrated above, the Fifth Amendment may not be invoked as a device to effectuate an ongoing tax avoidance scheme of the kind practiced by petitioner, petitioner cannot be found guilty of "willfully" failing to file a tax return if he believed in good faith that he was entitled to invoke the Fifth Amendment in lieu of filing a truthfully executed return. *Garner* v. *United States, supra,* 424 U.S. at 663 n.18. In this case, however, the district court expressly found that petitioner's failure to file returns in 1974 and 1975 was "willful" and that he did not assert the Fifth Amendment in good faith. The court noted (Tr. 90) that he was "not motivated in any way by any good-faith claim or reasonable ground or belief that he was * * * incriminating himself." That finding should not be overturned unless "clearly erroneous." *United States* v. *Glover*, 514 F. 2d 390, 391 (9th Cir.), cert. denied, 423 U.S. 857 (1975); *United States* v. *Hood*, 493 F. 2d 677, 680 (9th Cir.), cert. denied, 419 U.S. 852 (1974). Applying the proper standard, the court of appeals determined (Pet. App. "Opinion" at 20) that "the trial judge's conclusion that Carlson failed to assert the privilege in good faith was [not] clearly erroneous." The facts summarized above fully support the court of appeals' determination. There is no reason for this Court to reexamine that factual question.[11]

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sanctions for prohibited behavior, but rather as a means to obtain self-reporting that is "indispensable" to the fulfillment of the statutory purpose. The "income tax laws" are directed to "all persons" and involve no demand for information from a small group that is "inherently suspect of criminal activities." 402 U.S. at 430-431.

[11]At all events, there is no need to reach this question here since, as we have pointed out previously (see page 6, *supra*), the tax forms petitioner submitted did not satisfy the statutory filing requirement because the declaration that the forms were completed and signed under penalty of perjury had been obliterated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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